RRC STAFF OPINION

*Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.*

AGENCY: NC OFFICE OF INFORMATION TECHNOLOGY SERVICES

RULE CITATION: 09 NCAC 06A .0102

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff’s comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In some of the individual definitions contained within this rule, counsel requested additional detail or perhaps even a clarification of terms within a definition. Counsel is of the opinion that you should object to this rule based on the ambiguity of terms in other rules until all the rules are approved or returned to the agency. This will allow the agency to add defined terms to this rule if necessary.*

*In (11) line 11 counsel is unclear as to what “respective” offers are referred to. If it simply means any of the offers that are received, then the adjective is unnecessary and may be confusing. If that is the case it could be deleted without changing the meaning. In line 14 it is also unclear what is meant by or constitutes “evaluation credit.”*

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AGENCY: NC OFFICE OF INFORMATION TECHNOLOGY SERVICES

RULE CITATION: 09 NCAC 06A .0103

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff’s comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In (f) line 18 it is unclear what constitutes or is meant by “special delegation.” The term is undefined here or in the definitions rule.*

RRC STAFF OPINION

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AGENCY: NC OFFICE OF INFORMATION TECHNOLOGY SERVICES

RULE CITATION: 09 NCAC 06B .0301

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff’s comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In (b) line 14 and (b)(2) line 30 it is unclear what constitutes or is meant by “special delegation.” The term is undefined here or in the definitions rule.*

*In (b) lines 13 – 15 it is unclear what the standards are for granting an exemption.*

*In (b)(1)(A) line 25 it is unclear what the advertising approval standards are. There is no authority to make those standards outside rulemaking.*

*In (b)(2)(A) and (B), page 1 line 33 and page 2 line 1 respectively, it is unclear what the approval standards are.*

*In (b)(3) page 2 line 6 it is unclear what standards shall be used to grant “approval prior to proceeding” with the procurement process. There is no authority to make those standards outside rulemaking.*

*It is not clear who has the authority to make awards under this rule.*

*Rule 6A .0103 gives either the Board of Awards or the state CIO – it’s not abundantly clear which one – the decision making role for contracts exceeding the benchmark amount. This rule in (b)(3)(C) appears to give it to either ITS – the office, or to the CIO.*

*A related issue is that it is not clear who or what constitutes ITS decision making that is separate from the CIO. If they are not separate entities for this purpose, then it is unclear why they are both referred to and whether there is any separate function for each.*

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AGENCY: NC OFFICE OF INFORMATION TECHNOLOGY SERVICES

RULE CITATION: 09 NCAC 06B .0309

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff’s comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In (b) line 12 it is unclear what standards the State CIO is going to use to determine which agency personnel’s participation is “necessary ... in the procurement process” so as to be entitled to possess offers and otherwise conclude the award process.*

RRC STAFF OPINION

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AGENCY: NC OFFICE OF INFORMATION TECHNOLOGY SERVICES

RULE CITATION: 09 NCAC 06B .0314

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff’s comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In (b)(1)(A), page 3 lines 5 and 6, there are no specific guidelines for ITS to use in deciding whether to waive the advertising methods required by this rule. G.S. 150B-19(6) allows an agency to waive or modify the application of any of its requirements if “a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.” There are no guidelines whatsoever in this rule.*

*In the staff comment for rule 6B .0301 there is mention of a problem with the role of the office of ITS and the role of the State CIO in making certain determinations. That problem is present in this rule in (b)(1)(A). This paragraph gives ITS waiver authority and it’s not clear who is ITS if it’s not the State CIO. What makes it even murkier is the fact that paragraph (a) gives a similar waiver authority to the State CIO in (a)(2) lines 15 and 16.*

*As part of the same issue is the fact that the State CIO’s waiver authority in (a)(4) is limited by the conditions in (a)(4)(A) – (F) whereas in (b)(1)(A) there is no limitation on the Office of ITS’ waiver authority.*

*Paragraph (b)(5), page 4 lines 13 and 14, contains a waiver, “unless otherwise directed by ITS” without specific guidelines. Paragraph (b)(7) includes a “valid reason[s] to request a waiver in (B) and what must be included in the waiver request in (C), but there are no standards set out for what ITS shall use in determining whether to grant a waiver.*

RRC STAFF OPINION

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AGENCY: NC OFFICE OF INFORMATION TECHNOLOGY SERVICES

RULE CITATION: 09 NCAC 06B .0316

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff’s comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In (a) and throughout this rule it is unclear who or what constitutes “ITS” and the “State CIO.” As mentioned earlier the distinction or difference between the two is unclear and whether one can overrule the other is unclear.*

*In (a) it is also unclear what standards ITS or the State CIO will use to grant “prior approval to negotiate.”*

*There are also no standards in (b) for approving negotiating procedures, line 10.*

RRC STAFF OPINION

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AGENCY: NC OFFICE OF INFORMATION TECHNOLOGY SERVICES

RULE CITATION: 09 NCAC 06B .0405

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff’s comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In (a) lines 5 and 6 it is unclear what standards ITS will use to determine “acceptable” communication methods.*